St. Vincent Medical Center, A Division of Catholic Healthcare West, Southern California *and* Healthcare Employees Union, Local 399, Affiliated with the Service Employees International Union, AFL–CIO. Case 31–CA–24325

March 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The issue presented in this proceeding[1] is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the employees in its respiratory care department and subcontracting out their work shortly before a representation election involving these employees. The judge found that the General Counsel had failed to meet his initial burden under the *Wright Line*[2] test of establishing that antiunion sentiment was a substantial or motivating factor in the Respondent's decision to subcontract the respiratory care department. The judge accordingly concluded that the Respondent did not violate the Act and recommended that the complaint be dismissed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order dismissing the complaint.[4]

1. The Union requests that the Board take judicial notice of the judge's decision in *St. Francis Medical Center*, Case 21–CA–32642 (Dec. 15, 2000), and the Respondent filed an opposition. The Union asserts that the Board should consider the findings in that case because the respondent in that proceeding and the instant Respondent are both owned and operated by Catholic Healthcare West. We decline to take judicial notice of *St. Francis Medical Center* because it is pending on review before the Board and the judge's findings therein are not binding authority. We deny the Respondent's motion to strike the Union's exception number three which contains the request to take judicial notice.

2. The General Counsel filed a motion to strike two health care journal articles, and California State statute citations, relied on by the Respondent in its opposition brief to the General Counsel's exceptions. The Respondent filed an opposition to the motion to strike, and requests that the Board take judicial notice of the California State statutes. We grant the General Counsel's Motion to Strike the two articles because they are outside of the record in this proceeding. It is not necessary to take judicial notice of California State statutory authority. The Respondent's citation to that authority in its brief is sufficient to draw it to our attention. We deny the General Counsel's Motion to Strike the statutory citations.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Anne P. Pomerantz, Atty., for the General Counsel.
Stephen P. Pepe and *Eva B. Antolinez, Attys. (O'Melveny & Myers LLP)*, of Newport Beach, California, for the Respondent.
James Rutkowski, Atty. (Van Bourg, Weinberg, Roger & Rosenfeld), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Los Angeles, California, on June 26, through June 30, 2000, and is based on a charge filed by Healthcare Employees Union, Local 399, affiliated with the Service Employees International Union, AFL–CIO (Union), alleging generally that St. Vincent Medical Center, a Division of Catholic Healthcare West, Southern California (Respondent), committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). On March 22, 2000,

[1] On December 11, 2000, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel and the Union each filed exceptions and a supporting brief. The Respondent filed a brief in opposition to the exceptions of the General Counsel and the Union. The Respondent filed cross-exceptions to the judge's decision.

We reject the Respondent's contention that the Board should disregard the General Counsel's exceptions because they fail to comply with Sec. 102.46(b)(1) of the Board's Rules and Regulations. The General Counsel's exceptions substantially comply with the Board's Rules and Regulations and are sufficient to warrant Board consideration.

[2] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The General Counsel contends that he presented evidence establishing that antiunion animus was a motivating factor in the Respondent's decision to subcontract the respiratory care department. Assuming arguendo that the General Counsel satisfied his initial burden under *Wright Line*, supra, we find that the Respondent has proven its affirmative defense under *Wright Line* of demonstrating that it would have taken the same action even in the absence of the employees' protected activities. Specifically, the Respondent has established that it implemented its subcontracting decision within the 30-to-60-day timeframe it announced prior to the filing of the petition for a representation election.

the Regional Director for Region 31 of the National Labor Relations Board (Board), issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (3) of the Act. The general thrust of the complaint is that Respondent violated the Act by discharging and contracting out the work of 27 respiratory care employees on February 1, 2000. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and the answer admits, that Respondent is a California corporation, with its principal place of business at 2131 West Third Street, Los Angeles, California, where at all times material herein it has been engaged in the operation of a hospital; that during the calendar year preceding the issuance of the complaint, in the course and conduct of its business operations, it purchased and received at its facility mentioned above goods valued in excess of $50,000 directly from enterprises located outside the State of California; that during the same period it derived gross revenues in excess of $250,000.

Accordingly, I find and conclude that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The General Counsel alleges that St. Vincent Medical Center violated Section 8(a)(1) and (3) of the Act by subcontracting its respiratory care department (respiratory care or the department) to California Respiratory Care Services (CRS), allegedly because (1) the respiratory care employees engaged in union activities and to discourage other employees from supporting the Union; or (2) the respiratory care employees concertedly refused to sign 12-hour shift program acknowledgement forms.

St. Vincent Medical Center (SVMC), is an acute care hospital located in Los Angeles, California, employing approximately 1100 employees. The hospital is headed by its president, Bill Parente. Eleanor Ramirez, senior assistant administrator of operations, reports to Parente and is accountable for the operations of the medical center including all the patient service areas, the ancillary services, the professional service areas, risk management, and corporate compliance. Zita Uy, assistant administrator with responsibilities over all ancillary departments and general services, reports directly to Ramirez. The ancillary departments include the diagnostic departments such as radiology, laboratory, pharmacy, respiratory care, physical therapy, occupational therapy, and speech pathology. General services include the facilities department, nutrition services, environmental services, and biomedical. These departments comprise approximately 250 employees.

The respiratory care services department or "RC" employees are respiratory therapists responsible for administering various treatments throughout the entire hospital. They go where needed to administer everything from intubations to ventilators or life support systems. They are responsible not only for carrying out doctors' orders for treatment, but also for using their independent judgment and doing what is best for the patient. In order to judge what needs to be done, the therapists must do assessments of patient health and report on the patients' status to the oncoming shift in order to ensure continuity of treatment, regardless of whether a form is used. The expected goal in administering all treatments is a successful outcome; that is, one where the patient improves or is cured. As the audits of the records show, this is not always possible.

Until February 1, 2000, the 27 RC employees were directly employed by Respondent. On that date, however, the 27 employees in that department were all discharged, and Respondent no longer directly employed any respiratory therapists. Instead, Respondent entered into a contract to have such services performed by a subcontractor, which, in turn, and at the insistence of Respondent, immediately employed all the laid-off employees. Thus, since that date, the employees have performed the same work, in the same locations, but in the employ of a different employer and under different working conditions.

B. Issues

Counsel for the General Counsel contends that Respondent took the action it did in order to retaliate against employees for their concerted activities, and in order to thwart the desires of employees for union representation. Respondent counters that its actions were caused purely by business considerations, and the desire to correct longstanding problems.

The Union first began its activities at Respondent's facilities in early 1998. Though those activities were initially minimal, Respondent acknowledges that it became aware of them almost immediately. That awareness happens to coincide with Respondent's expressed knowledge of, and concern about, problems within the respiratory care department.

Counsel for the General Counsel contends that Respondent took action against the RC employees only after the Union intensified its campaign at Respondent's facility in mid-1999, and only after the employees had concertedly refused to sign consents to have their hours of work changed.

C. Facts

This case had remarkably few factual disputes between counsel for the General Counsel and Respondent. Thus, unless highlighted below, I have accepted counsel for the General Counsel's evidence as true, and Respondent's evidence as true. In either instance, their evidence was unrefuted.

Until 1998 the RC employees worked under the supervision of Barbara Asmundson, and during the night, under Ramon Suarez. However, Respondent's evidence was that it became concerned about the consistent failure of the department to meet standardized productivity standards, i.e., the MECON measurements. This led to a decision to remove Asmundson in early 1999. Into her place, Respondent promoted Ray Hancock, who already was the manager of cardiology. These steps were taken by Zita Uy, the assistant administrator who oversees the RC department, and who reports to Eleanor Ramirez, the senior assistant administrator of operations and nursing.

However, Hancock may or may not have been a good choice for the position. First, he had no specialized training for respiratory care, though he did have experience in the work. Further, not only was he already in charge of the cardiology department at Respondent's facility, he also managed the same two departments in another hospital a few miles away. Uy selected him based upon his success in the cardiology department, and his training as s registered nurse, and his experience in the pulmonary field.

At the same time, the duties of Suarez were expanded to extend into the day shift, leaving the night shift to essentially run itself. When it took this action, Respondent was admittedly aware of the fact that Suarez had a very poor record as a supervisor, and that he lacked the skills to perform supervisory work successfully.

Respondent's evidence shows that in early 1999, Uy and Hancock had several meetings to discuss the status of the department, and specifically to go over the MECON results. Then, in April, the pulmonary section committee, made up of medical staff at the facility, issued its regular quarterly report. The report was critical of the operation of the RC department in a number of respects. Later that same month, consistent with complaints from employees about being overstaffed and being sent home, Respondent laid off six RC employees.

Respondent's evidence also showed that during 1998 and 1999 the RC department repeatedly failed to, among other things, administer treatments to patients, or to properly document patients' charts for treatments. This led to patients being deprived of medical attentions called for by their doctors, as well as some being over billed and others being under billed. In April 1999, Respondent created a committee to audit such errors. This led, on May 26, 1999, to Hancock and Suarez being instructed to develop an action plan concerning the documentation issues in the department, to monitor the situation more closely, and to discipline employees who failed to properly document treatments.

On May 27, 1999, Uy met with Suarez to discuss the problem of "missed treatments." Suarez was instructed to monitor the problem more closely.

In June 1999, further criticism of the department by the auditing committee led to Hancock being instructed to more closely monitor and assess Suarez' performance.

In July 1999, Uy met with Ramirez to discuss the RC department. According to Uy, they noted that the experience during 6 months preceding had not led to improved performance by the department, despite the change in supervision. This led to a discussion of the relative merits of subcontracting the department's work. Uy testified that she recounted the successful use of that device in other departments. In the end, however, Uy and Ramirez decided to give Hancock and Suarez additional time to work out the problems, and agreed to meet again to review the situation in 3 to 4 months.

Of note, there is no claim that any of the employees was a poor employee, or did substandard work, or deserved discipline. Yet, Respondent presented much credible evidence that it continued to receive persistent complaints from medical staff about work being done improperly or not at all.

The audit charge master committee and its subcommittee constantly recommended staff training/education and implementation of new procedures, charge codes, and forms. However, no training was done by any manager or doctor during 1999, and no new equipment was forthcoming. A new assessment form was ordered, but did not arrive before the subcontract took effect. Likewise, despite the fact that they had been asked for 2 years ago, neither new, additional billing codes, nor per diem staff were provided until after the subcontract took effect.

However, even if these things had been provided, it seems unlikely that they would have solved the problem. Ramirez, Uy, Hancock, and Suarez acknowledged within their various own meetings, that the RC department's problems were attributable to deficits in Hancock's and Suarez' abilities to manage the department and the issues that arose therein. In fact, Respondent's managers and agents testified explicitly that any deficiency lay at the feet of the leadership, not the employees. Hancock and Suarez themselves discussed the fact that the RC department's problems could be fixed by having the right manager.

The evidence is undisputed that the RC employees themselves repeatedly called Respondent's attention during the summer and fall of 1999 to the problems they encountered which, in their view, prevented them from performing their doing jobs properly, e.g., the lack of "billing codes" and equipment, and being continually understaffed. Respondent's management did not then, or since, criticize any employee for "slacking off." Indeed, though given numerous opportunities during the trial to blame the problems of the RC department upon the employees who worked there, all such opportunities were refused. Indeed, aside from a random instance having no relevance here, the record shows that despite the months and months that Respondent allegedly suffered under the burdens imposed by the maladies of its RC department no employee was ever disciplined for any wrongdoing.

According to Respondent's unrefuted evidence, the summer and fall of 1999, witnessed a continuation of problems within the RC department. The details are unimportant since they are unrefuted and I have no reason to find them to be untrue. Suffice it to say that during July, August, and September of 1999, Uy received complaints from various medical staff, and the charge audit committee about deficient work by the RC department. The complaints ran the gamut from work prescribed by physicians not being done to an RC therapist using a dirty needle on a patient.

Thus, true to her word several months earlier, Uy met with Hancock and Suarez on November 18, 1999. After noting their

inability to resolve the department's problems, Uy, for the first time, raised the possibility of subcontracting the department's work. At no time during the meeting was the issue of the Union, or its activities, raised or discussed.

Next day, Uy informed Ramirez that the problems in the RC department had not improved since their last talk several months earlier despite the fact that they'd "tried really hard," and that Hancock and Suarez suggested the department be subcontracted. The meeting ended with Ramirez giving her authorization for Uy to investigate the subcontracting possibilities further, and agreeing to meet again in the near future to discuss the issue.

Uy and Ramirez met again on December 20, 1999, to discuss the issue. Though they first discussed the possibility of replacing the managers of the RC department, that possibility was rejected according to the credible testimony of Uy because it had already been tried without success, and Uy's doubts about her own ability to successfully select another manager. At the end of the day, Uy and Ramirez were in agreement that subcontracting offered the best chances of success in dealing with the problems of the RC department. Uy credibly testified that the subcontracting of the work of several departments had led in the past to improved performance in those departments. They admittedly embraced the concept that, if the changes did not work out, the responsibility for the problem would rest with the subcontractor, and not them.

Uy ultimately recommended that subcontracting be considered. At no point during their meeting was the Union, or its prospects, discussed.

Thus, on December 22, 1999, Uy and Ramirez met with Respondent's president, Parente, and discussed subcontracting the department, with Hill, Respondent's director of human resources participating by phone. Uy and Ramirez recommended subcontracting the RC department. In turn, Parente concluded that he should accept the recommendation, adding that it would be the responsibility of the subcontractor to provide an acceptable manager for the department, and that, if the first manager selected were to fail, to find another manager.

Meanwhile, on December 7, 1999, Respondent held a mandatory meeting with all the RC department employees. The purpose was to discuss a new California law which provided that employers pay overtime pay for hours worked in excess of 8 hours per day, unlike the previous law which merely required overtime payments for hours in excess of 40 per week. Respondent announced what the employees took to be a wage decrease of 14.22 percent. Naturally, this led to a good deal of discussion, the details of which are not important here. What is important is that the meeting ended with Respondent passing out ballots and telling employees to vote. Hancock remained in the room to collect the ballots.[1]

Within the next couple of weeks Respondent left forms out for employees to sign, acknowledging the cut in the pay rate and consenting to work 12-hour shifts. Yet, none of the employees signed the forms or returned them to Respondent. The evidence is that their failure to do so was concerted in nature. Hancock and Hill acknowledged that they were aware of the failure of the employees to return the forms.

Respondent, however, points out that the change in schedules and pay rates were mandated by a new law, and not due to any choice of Respondent. It also points out that as it prepared to implement the changes mandated by law, it sent an explanatory letter to employees telling them of the passage of the new law, and explaining the implications for employees of the hospital. It also explained that it would soon start holding meetings with all employees within the hospital so that they could vote on the question of whether or not to adopt a system which called for a 12-hour shift, rather than 8-hour shifts. Indeed, Respondent points out that most employees already worked 12-hour shifts, and preferred to do so in order to have more time off, i.e., 3 day "weekends." Respondent argues that the alleged wage decrease was not "real," as it was merely an adjustment so that employees would continue to receive the same wage on a daily basis. It also points out that those employees who voted against the 12-hour shift program were returned to 8-hour shifts soon thereafter. When all the votes were counted Respondent found that 80 percent of the employees voted in favor of its plan for a 12-hour shift.

Finally, while Respondent concedes that on December 22, 1999, it did pass out forms and ask employees to acknowledge the changeover to the new plan, when it learned that the RC employees (as well as the RN and LVN employees of another department), were refusing to sign the forms, it simply abandoned any efforts to secure such acknowledgements, since they were unnecessary. Instead, it simply went ahead and implemented the plan.

Turning back now to the facts of the "subcontracting," on or about December 23, 1999, through Suarez, Respondent first contacted Theodore J. Weiner, the president and CEO of Total Rehab Care (TRC). This contact led to negotiations which, in turn, led to Respondent entering into a contract with TRC by which, beginning on February 5, 2000, TRC took over the management of the Respondent's respiratory care department.

On January 5, 2000, the Union filed a petition for an election among Respondent's employees. On January 21, 2000, the parties entered into a stipulation for an election to be conducted by the Board on February 18, 2000. As a result, had the RC department therapists remained employees of Respondent at the time of the election they would have been eligible to vote. While, of course, if they were no longer employed by Respondent on the date of the election, they would not be entitled to vote.

On February 1, 2000, Respondent conducted a meeting with all the employees of the RC department, and informed them of the upcoming subcontracting of their work, effective February 5, 2000. After that meeting, Ramirez and Uy introduced the subcontractor's president, Weiner, to the employees.[2]

[1] While one of the General Counsel's witnesses initially testified that the therapists were not given an option, he later admitted that Hill told employees that they would be voting on whether to adopt Respondent's 12-hour shift plan or to return to an 8-hour shift.

[2] The termination packages which Respondent prepared for each employee initially stated that the cause of the changes was budgetary. Upon learning of that fact, Hill immediately sent a correcting letter to

Regarding the fact that Respondent insisted that the subcontractor hire all its former RC department employees, Respondent points out that it had no reason to believe that the employees were unskilled or unwilling to do the work properly, given the correct management and supervision. It also points out that such insistence is consistent with Respondent's religious mission.

After the subcontracting took effect, the same employees continued to do largely the same work in the same place where they'd worked previously. Moreover, the same supervisors (Asmundson, Hancock, and Suarez), were also hired by the subcontractor.

However, the evidence is that Asmundson and Suarez had their duties changed so that, while they remained supervisors, they no longer worked in positions which called for the use of "people skills," or which called upon them to perform discipline or exercise leadership.

The record contains unrefuted evidence that, due to reforms instituted by Weiner, Respondent's objective quality assurance monitors reveal that since the subcontracting occurred the RC department has dramatically improved in a variety of ways, and that complaints from physicians about its operations have ceased. Thus, Respondent views the subcontracting to have been the needed cure for the problems previously experienced in the department.

D. Discussion

It is clear that the governing law in this case is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989. There, the Board announced the following causation test in all cases alleging violations of 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

> First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.
>
> Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983).

Turning now to the specifics of this case, it is well established that subcontracting such as the Respondent admittedly engaged in here is violative of Section 8(a)(3) of the Act if it is motivated by animus against (a) union or (other) protected acts. See, e.g., *Joy Recovery Tech. Corp*., 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (1998); *Pollution Control Industries of Indiana*, 316 NLRB 455 (1995); *Special Mine Services*, 308 NLRB 711, 720 (1992), enfd. in relevant part denied in part 11 F.3d 88 (7th Cir. 1993); *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

The General Counsel must establish unlawful motive or union animus as part of the prima facie case. Unless animus is found to exist, the General Counsel's case must fail. As such, this case must perforce turn on whether the Respondent acted with animus. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.*, 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc*., 311 NLRB 498 (1993); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988).

The normal beginning point of an examination into whether or not discrimination has been practiced by an employer is to look at what action was taken, and its surrounding circumstances.

But, in this instance, that approach simply doesn't work very well. Here, neither the "events," nor their surrounding circumstances say very little about discrimination.

This so because the "events" in question, i.e., the discharges and subcontracting are not themselves unlawful, without more, such as a failure to honor an obligation to bargain. They are not inherently violative of the Act in and of themselves. Employers are generally free to make business judgments about how to run their businesses, regardless of whether a union is in the picture or not. Again speaking generally, an employer is free to reach and implement decisions about how many employees to employ, and how to utilize them, and whether it wishes to have certain tasks performed by its own employees or to have them performed by the employees of another employer.

But, as shown above, an employer is not free to reach or implement such decisions if it does so as part of a scheme to discriminate against employees who have engaged in activities which are protected by the Act, such as having given consideration to the question of whether or not to secure union representation for themselves.

That is why the sole determination to be made in this case is whether or not the evidence will support the conclusion that when Respondent took the action of discharging the RC employees and subcontracting their work it did so with "animus," or the desire or intent to discriminate.

In deciding such a case, among the factors which a judge normally examines first is the timing of the events which are claimed as discriminatory. Here, there was but one event, the discharges set out above and simultaneous subcontracting of the work previously performed by those who were discharged.

Yet, as shown, while the Union began its campaign at Respondent's facility about 2 years previously, counsel for the General Counsel relies upon the voluminous testimony of several of her witnesses to evidence that the Union "stepped up" its campaign activities in mid-1999 (still months and months prior to the discharges and subcontracting), and to the fact that most of the Union's success in securing authorization cards from employees occurred thereafter. None of this testimony was denied or contradicted directly. Thus, having no reason to disbelieve it, I credit all such testimony, and completely accept counsel for the General Counsel's asserted facts as true. From

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all employees, and offering a corrected letter of reference to any employee who requested one. No employee made such a request.

this, it is argued that the Respondent was aware of the Union's increased activities, and its increased success.

However, though I find those facts to be true, I do not find them persuasive of the ultimate conclusion sought by counsel for the General Counsel. In fact, based upon the evidence as a whole, I am inclined to accept the viewpoint sought by Respondent, i.e., that, so far as Respondent was concerned, the Union had been nosing around the hospital ever since early 1998, and that, while Respondent sought to (and sometimes succeeded), in learning some details about the Union's activities, it simply wasn't able to draw any hard and fast conclusions concerning whether such details amounted to clear evidence of heightened activity by the Union or its adherents among the employee complement. I say this despite the General Counsel's clear evidence, which I credit, that Respondent could not have failed to have identified the RC employees as the core of the Union's supporters among the hospital's employees, and that Respondent may well have deduced, and probably did deduce, from such intelligence that the RC employees were the most likely proselytes of the Union's cause in other departments. Indeed, accepting counsel for the General Counsel's evidence, I must ask why Respondent didn't make the change in mid-1999, simultaneous with the Union stepping up its campaign and with the gains in support were seen among the RC department employees. If Respondent's intent was to stop the Union from gaining support among the employee complement it seems far more likely that it would have taken action before, not after, the employees in the RC department began to succeed in gaining support for their cause among their fellow employees of Respondent in other departments. But, instead, as it had done for years, Respondent simply continued to allow the problems in the RC department to drift aimlessly.

What is most persuasive to me on this point is that the evidence is simply insufficient in my opinion to demonstrate a pattern of activity. Certainly Respondent knew of the Union's activities. Respondent admittedly made a studied effort to keep track of them, even going so far as to instruct supervisors to report any such activities they learned of. But a careful reading of the record reveals nothing more than various and sundry, seemingly isolated events concerning the level of union activity which can be shown to have been learned of by Respondent. In my opinion, the record does not sufficiently show the peaks and valleys of union activity. As a result, the "timing" of the discharges and subcontracting, occurring when they did, seems no more suspicious to me than it would have been had they occurred in early 1998, or in mid-1999, for examples.

Thus, I find and conclude that while the evidence is clear that Respondent had ample knowledge of the union activities and sympathies is insufficient to conclude that the "timing" of the Union's activities here preponderates in favor of the result desired by counsel for the General Counsel.

However, when looking at the timing between the filing of the election petition and the subcontracting action taken by Respondent a different result follows. From Respondent's standpoint the timing of the action could scarcely be imagined as worse. Announcing the change in the status of the employees, and subcontracting out their work, only about 3 weeks after the filing of the petition for an election seems on its face so suspicious that if there were *any* evidence of animus or direct intent to discriminate that one would not hesitate to find the subcontracting to have been violative of the Act, as discussed below.

Next, a judge often looks at whether or not an employer has committed other violations of a similar nature in the past, or whether other violations of the Act have occurred around the time of the events in question.

Here, contrary to General Counsel's position, I note that Respondent has never before had a charge filed against it, much less been found to have violated the Act, as might warrant an inference that it has a proclivity to violate the Act. Moreover, there are absolutely no independent violations of Section 8(a)(1) of the Act either alleged or proven to have occurred in this case.

The absence of such evidence is a relevant factor to be considered by me in making my determination as to whether or not Respondent intended to discriminate when it reached and implemented its decision to contract out the work of the RC department.

Thus, I find and conclude that here there is nothing in the Respondent's labor relations history to even suggest that the events of this case should be viewed with suspicion.

Another persuasive factor which is normally examined is whether or not Respondent has acted here consistently with its past practices. Here, the only evidence on the point is the testimony that Respondent had previously subcontracted the work of entire departments in the past, in instances where the record is entirely silent on the question of whether or not there was any contemporaneous union activity. I have no reason at all to disbelieve that testimony.

Thus, on this record, there is nothing to base a finding that Respondent has belied its stated business purpose in subcontracting the work by virtue of deviating from an established practice.

Of course, among the strongest indicators of an intent to discriminate is where there is evidence that an employer has treated (an) employee(s) disparately from the way in which it treats others. For example, where a group of employees has been demonstrated to have an interest in the cause of unionism, and soon thereafter an employer begins to enforce work rules against members of that group in a more stringent fashion than it has enforced them in the past, or more stringently than it enforces them against employees not shown to have an interest in unionism, a strong and clear inference is warranted that the employer harbors a desire and intent to discriminate.

But, here again, the record is entirely lacking any such evidence. Thus, on this issue the record is equally unhelpful to the General Counsel's point of view.

Indeed, none of these points is even argued by counsel for the General Counsel.

Thus, at this point, counsel for the General Counsel's cause, must be seen as hanging from but two slender threads.

First, counsel for the General Counsel agues that animus is shown by virtue of (failure to sign the forms to change hours).

Second, the changes, with the same employees, performing the same work, under the same supervision, upon the same sorts of patients.

After careful consideration, I find and conclude that neither is sufficient to constitute a prima facie case for the General Counsel.

Counsel for the General Counsel argues in her brief that the activities of the employees in the RC department at Respondent's facility in voting upon, and later refusing to return the questionnaire distributed by Respondent, constitute concerted, protected, or union activities.

While I find that the evidence in the case supports that argument, I further find that the evidence will not support a conclusion that such action was taken in response to any illegal activity on the part of Respondent, or that any action was taken against any employee in reprisal for their having refused to return the questionnaire.

As stated above, there is no argument advanced by the General Counsel that the changes made in the employees' schedules were not made pursuant to the requirements of a newly enacted law, or were otherwise illegal. I conclude further that there is no evidence to support a finding that such changes were made as part of some plan by Respondent to exact reprisals from employees on account of their union sympathies and activities. Thus, the facts that Respondent no doubt had fairly intimate knowledge of such activities, and the identities of those engaging in them, is of no moment here. Having such knowledge is not itself illegal, and it becomes illegal only if such knowledge is gained in an illegal fashion (e.g., by surveillance or interrogation), or is used as a basis for later reprisal against those employees who are union adherents or activists.

In my opinion counsel for the General Counsel's strongest and most persuasive argument rests not upon any direct, or even circumstantial, evidence produced by her regarding Respondent's intent in reaching and implementing its decision to subcontract. Rather, it is that on the surface, Respondent's reasons for proceeding as it did seem to lack plausibility, and that the subcontracting followed so closely upon the heels of the filing of the petition for a union election. The Board has pointed out time and again that mere timing is not enough to establish liability. See, for example, *Royal Coach Sprinklers, Inc.*, 268 NLRB 1019, 1028 (1984). Thus, while not dispositive, clearly here the proximity in time between the filing of the petition herein and the act of subcontracting is sufficient to satisfy that element of the case in favor of the General Counsel. I so find and conclude.

The argument that Respondent's decision to subcontract is utterly lacking in a good basis, or sound business justification, has a certain visceral appeal. Counsel for the General Counsel seeks redress for the effective disenfranchisement of the employees within Respondent's employee complement who most strongly supported the cause of unionism right up until the filing of the petition herein. And, the argument also has a certain amount of reason to support it, based not only upon its timing, but also upon the seeming lack of a clear rationale for the way in which it was carried out.

After all, this was not the first time that Respondent had found fault with the operations of the RC department. Indeed, from the General Counsel's viewpoint, Respondent had already gone to the trouble of changing the supervision of that department, the previous year, and that hadn't improved the state of affairs. Nor did Respondent seem to be in any great hurry to obtain improved results in the department in mid-1999 when the issue was raised again and the difficulties with its new supervision had become apparent. Instead, the problem was simply allowed to drift on for months. The General Counsel's argument continues, why should the remedy adopted by Respondent so conveniently close upon the heels of the filing of the petition be viewed as having any greater chance of success? Especially when it is recalled that the very same employees would be performing the very same duties, and that the very same supervisors would be still present?

As my comments at trial clearly indicated, that (i.e., the Respondent's asserted belief that a change in the leadership of the department could result in the desired improvement), is almost too much to believe. On its surface it appears to be a fabrication, and not a very good one at that.

The Board clearly states that judges are not free to substitute their own reason for that of employers as to how to run the employers' businesses. However, if an employer asserts a lame and unconvincing reason for its actions, a reason which is so lacking in plausibility that it simply flies in the face of all reason and plausibility, then a judge may infer that the asserted reason is false, and but a subterfuge, designed to conceal the true reason for the employer's actions. And, if this be true, then the further inference may be warranted that the true reason is one which the employer desires to conceal because it is an illegal reason, such as the intent to discriminate. *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 838 (1981*); McCain Foods, Inc.*, 236 NLRB 447, 452–453 (1978); *Colorflo Decorator Products*, 228 NLRB 408, 418 (1977). Cf. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. per curiam (1982). Such findings, of course, are sufficient to satisfy the requirement that animus be found to support allegations of discrimination.

However, upon considering Respondent's asserted reasons in further detail, their implausibility and falsity seem much less apparent or clearly established.

While I accept and believe all of the testimony of counsel for the General Counsel's witnesses to the effect that they are still performing the same work in the same fashion as they did prior to the subcontracting, I must note that individual employees have not been shown to have the same sort of access to the insights and intricacies of production (including complaints regarding the department's performance and adherence to standardized measures of productivity), as that which is possessed by management members. Thus, even while I believe the testimony of counsel for the General Counsel's witnesses, I have no warrant to ignore or disbelieve the testimony of Respondent's witnesses to the effect that since the subcontracting the problems have largely vanished, and that the complaints from medical staff have ceased altogether. The testimony of Respondent's witnesses on these points was apparently credible, and is entirely unrebutted.

Thus, no matter how improbable Respondent's action, or its timing, in subcontracting may seem held for success on the surface, there is no reasonable basis on this record which I perceive as enabling or causing me to doubt or challenge the very fact of its success in, at long last, remedying the RC department's longstanding, seemingly intractable, problems.

In viewing this result, I bear in mind that there have been historically numerous instances in which employers have made changes in the leadership of their operations, while leaving all other important factors unchanged. Corporations routinely replace one CEO with another. Sports teams routinely replace one manager or coach with another. And Abraham Lincoln was not the first or last national leader to demand or expect improved results from his army when he replaced General McClellan with General Grant. In other words, while it may not seem logical, it is a method which is often used, and it sometimes works.

In other words, no matter how improbably I may view Respondent's prospects for success merely because it sought improved performance by simply changing the leadership of employees, I find myself unable to find or conclude that it is not a time honored and frequently used solution to management problems. It clearly is a method which has been, and is, frequently criticized as a management tool. But, it cannot be argued that it is not repeatedly utilized. As such, I must, no matter how reluctantly, find that it passes muster.

Had I been in charge of Respondent's operations perhaps I would have utilized a different method, and perhaps I would have done so sooner. But, I cannot find that my method would necessarily have been so clearly superior to the one adopted by Respondent that I should, or can, find that Respondent's method should be found to be false on its face.

Thus, I find myself unable to conclude that I may, or should, infer that Respondent's asserted reason for the subcontracting, occurring when and how it did, bespeaks falsity, and leads to the further inference that it constitutes a showing of animus.

As a result, I am compelled to find and conclude that the General Counsel has not satisfied the requirement of demonstrating animus on the part of Respondent,[3] and that this absence must perforce, in turn, lead to a finding, which I hereby make, that counsel for the General Counsel has failed to establish a prima facie case of discriminatory intent.

Summarizing, I find and conclude that counsel for the General Counsel has failed to establish a prima facie case by the preponderance of the credible evidence in any respect alleged. Accordingly, the complaint shall be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

IT IS ORDERED that the complaint be, and it is, dismissed in its entirety.

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[3] While the General Counsel presented some evidence that Hancock made a remark that an employee named Moore hadn't been helped by the fact that his face had recently been portrayed on a leaflet of the Union, I credit Hancock's strong denial that he never made the remark ascribed to him, or any similar remark.

[4] All outstanding motions, if any, inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections thereto shall be deemed waived for all purposes.